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No. 00-445

IN THE

Supreme Court of the United States

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners hereby amend the corporate disclosure statement filed with this petition for a writ of certiorari. (Case No. 00-445). For convenience, provided below are the page numbers of the petition for a writ of certiorari listing petitioners as to which an amended statement is provided.

Carolina Power & Light (p. x)
(parent: Progress Energy, Inc.)
(State Street Bank & Trust Company Boston is no longer a 10% or greater owner)

Central and South West Services, Inc. (p. x) (now merged with American Electric Power Co., Inc.)

Central Illinois Public Service Company (p. x) (now known as AmerenCIPS)

Central Power and Light Company (p. x)
(parent: American Electric Power Co., Inc.)

Florida Power Corp. (p. x)
(parent: Florida Progress Corporation, which is a subsidiary of Progress Energy, Inc.)

Illinois Power Company (p. xi) (now known as Dynegy Marketing and Trade)

Otter Tail Power Co. (p. xi)
(Otter Tail Power Co. ESOP is no longer a 10% or greater owner)

PacifiCorp Electric Operations (p. xi) (now known as PacifiCorp)
(parent: Scottish Power plc)

Public Service Company of Oklahoma (p. xii)
(parent: American Electric Power Company, Inc.)

Southwestern Electric Power Company (p. xii)
(parent: American Electric Power Company, Inc.)

Union Electric Co. (p. xii) (now known as AmerenUE)

West Texas Utilities Co. (p. xii)
(parent: American Electric Power Company, Inc.)

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ARGUMENT

In its response, EPA argues that Petitioners are mistaken in asserting that EPA relied on cost to the exclusion of air quality considerations in making its findings of "significant contribution" under § 110(a)(2)(D)(i) of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(D)(i). EPA Br. 10. Based on this argument, EPA now asserts that the issue is not whether a § 110(a)(2)(D)(i) significant contribution finding can be based exclusively (or primarily) on cost rather than air quality effects, but whether EPA may use cost analyses to develop the regulatory remedy in response to supposedly air-quality-based significant contribution findings. *Id.* at 12.

EPA's post-hoc attempt to re-frame the issue must fail. EPA did not make significant contribution findings based on air quality considerations. The record makes clear that (1) EPA considered air quality effects in deciding whether one state's emissions make *any* contribution to nonattainment air quality in another state, but (2) once EPA found any contribution, EPA determined whether that contribution was *significant* based solely on the cost of emission controls. This approach ignores the Clean Air Act's decisional criterion – *i.e.*, air quality effects – for assessing whether a contribution to nonattainment is significant, and therefore conflicts with cases in this Court and in the D.C. Circuit establishing that, where a statutory provision confines an agency's authority to consideration of a specific criterion, the agency is not at liberty to base regulatory actions on other criteria that it prefers to use.

With regard to the conflict between the decision below and the constitutional non-delegation doctrine, EPA does not even attempt to rely on or support the court of appeals' reasoning – *i.e.*, that, despite the lack of an intelligible

principle guiding EPA's action, the non-delegation doctrine is not applicable where that action affects less than "all American enterprise" or no more than "half of the nation." Pet. App. 28a. Instead, EPA contends that the statute provides an intelligible principle and that EPA acted consistent with that principle. EPA Br. 20. But the issue presented here is not whether some rationale rejected by the court might sustain EPA's action; the issue is whether the court's decision is consistent with the fundamental principle that lawful agency actions must always be bounded by an intelligible principle in statutory law. Because the court's basis for finding the non-delegation doctrine inapplicable cannot be reconciled with that principle, this Court should grant the petition and review that decision.

I. BY UPHOLDING EPA'S SUBSTITUTION OF COST FOR AIR QUALITY IN DETERMINING WHETHER AN AIR QUALITY CONTRIBUTION IS SIGNIFICANT, THE COURT OF APPEALS' DECISION CONFLICTS WITH BASIC PRINCIPLES OF ADMINISTRATIVE LAW ESTABLISHED BY THIS COURT'S CASES.

EPA asserts that this case need not be reviewed because the Agency in its rulemaking examined whether one state's emissions *significantly* contribute to another state's ozone nonattainment based on air quality considerations, rather than cost. EPA Br. 10 (the petitions "rest largely on the mistaken assertion that the NO_x SIP Call 'rel[ies] on cost-effectiveness, to the exclusion of air quality effects, in assessing whether one state's emissions contribute "significantly" to another state's ozone nonattainment air quality.'"). The rulemaking

record contradicts EPA's assertion and shows that EPA is now attempting to avoid review based on a rationale that EPA did not use to support its significant contribution findings. EPA's characterization is revisionist history.

EPA used a two-step process to make its significant contribution findings. The first step was to determine whether a state made *any* contribution to another state's ozone nonattainment area. In this first step, which did involve evaluation of air quality effects, EPA modeled air quality effects in downwind ozone nonattainment areas resulting from all man-made nitrogen oxide ("NO_x") and volatile organic compound emissions from each upwind state. 63 Fed. Reg. 57,391 (1998). If EPA found no air quality effects above a very low air quality effects threshold, EPA declared that there was no contribution (or "linkage") by the upwind state to the downwind state's nonattainment air quality. *Id.* ("The first step in evaluating this [modeling] information was to screen out linkages for which the contributions were very low...."). However, if an upwind state's effects exceeded EPA's very low threshold, EPA declared an air quality contribution "linkage" – *not* a "significant" contribution – between that state and the downwind state's nonattainment area, and then proceeded to the second step. In other words, EPA used its air quality threshold only as a screening tool to determine whether or not a state "contribute[s]" to downwind nonattainment, *not* to determine whether or not a state contributes "significantly."[1]

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[1] EPA appears to claim now that it used the air quality threshold to decide whether a contribution was or was not "significant." EPA Br. 10-11 n.6. This claim is wrong and misleading. EPA was careful to explain in the preamble to the final rule that, only "for ease of discussion," it used the term "significant" to describe the contribution "linkages" identified in the first step of its analysis. 63 Fed. Reg. 57,381 (1998). However, EPA

In the second step, EPA ignored air quality considerations entirely and evaluated whether a state's air quality contribution was "significant" within the meaning of § 110(a)(2)(D)(i) by calculating the amount of that state's NO_x emissions that, in its view, could be controlled cost-effectively. 63 Fed. Reg. 57,381 (1998). EPA established a cost-effectiveness "cutoff" of $2000 per ton of NO_x removed.

Thus, EPA's "actual finding of significant contribution" (*id.*) was that amount of NO_x emissions in each "contributing" state that EPA estimated could be eliminated at a cost of $2000 per ton or less. Whether and to what extent that amount of NO_x emissions had any effect on air quality in any downwind nonattainment area was never determined by EPA and therefore played no role whatsoever in EPA's significant contribution findings.[2]

As Judge Sentelle recognized below, EPA's approach reads out of the Clean Air Act the word "significantly." *See* Pet. App. 59a-60a (Sentelle, J., dissenting). If a state is identified as "contributing," *i.e.*, is shown to cause air quality

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made clear that its "actual finding of significant contribution" – *i.e.*, its determination of whether a given contribution rises to the level of "significance" demanded by the statutory text – was based on its cost-effectiveness cutoff, not on any air quality evaluation. *Id.*

[2] EPA indicates that, after its second step, it went on to a third step that involved additional air quality modeling using the "cost-effective" NO_x emission reductions. EPA Br. 11. However, because that modeling was done on a regional, not state-specific, basis, it revealed nothing about whether any one state's emissions were having *any*, let alone a "significant," air quality impact in another state's ozone nonattainment area. Section 110(a)(2)(D)(i)'s plain language allows EPA to make a finding of "significant contribution" based only on emissions from "within ... [a] State"; it prohibits EPA from making such findings based on multi-state aggregations of emissions.

effects above the very low air quality threshold level chosen by EPA for distinguishing between *any* contribution and no contribution, the statute makes clear that EPA's second step should have been to evaluate whether that contribution to nonattainment air quality is "significant" *based on air quality considerations*. By contrast, EPA evaluated the "significance" of the contributions it found only by examining whether and how much NO_x emissions can be eliminated at $2000 per ton. Thus, under EPA's approach, each state with *any* contribution was automatically found to "contribute *significantly*" in violation of § 110(a)(2)(D)(i), in an amount equivalent to the amount of NO_x emissions that can be removed for $2000 per ton – irrespective of whether that amount of emissions has *any* effects on air quality in a downwind nonattainment area.

If EPA in the rulemaking had proposed, justified, and used its air-quality-contribution threshold as the point at which a contribution becomes "significant" under § 110(a)(2)(D)(i), then the characterization of its action in its Brief would be accurate. However, EPA did not propose its air quality threshold as a significance test, EPA did not justify that threshold for that purpose, and, most important, EPA did not use that threshold – or any air quality test – as its test for "significance" of contribution. Instead, EPA used that threshold only to determine whether *any* contribution existed at all, and then applied its $2000-per-ton cost-effectiveness cutoff to determine what contribution was "significant" within the purview of § 110(a)(2)(D)(i).

EPA's substitution of cost for air quality effects to determine the significance of an air quality contribution violates the fundamental administrative-law and separation-of-powers principle requiring Executive Branch agencies to base their

actions on the decisional criterion imposed by Congress in the governing statute – here, the amount of *air quality* contribution to another state's nonattainment of air quality standards that is "significant." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). If left unreviewed, the majority's decision upholding EPA's approach will undermine that fundamental principle and established case law reflected in numerous decisions applying that principle. *See, e.g., Ethyl Corp. v. EPA*, 51 F.3d 1053 (D.C. Cir. 1995).

Like the majority below, EPA here relies on *NRDC v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (en banc), to support its argument that it can consider cost in determining "significant contribution." In fact, however, that case supports Petitioners' position and confirms the unlawfulness of EPA's SIP call rule. The court in *NRDC v. EPA* unanimously *rejected* EPA's attempt to replace the Clean Air Act's decisional criterion for establishing hazardous air pollutant standards – *i.e.*, safety in terms of public health – with EPA's own cost criterion. The court found that, "in the face of uncertainty about risks to health, [EPA] has simply substituted [cost and] technological feasibility for health as the primary consideration under [Clean Air Act] Section 112." *Id.* at 1163. The court held that EPA must make "an initial determination of what is 'safe' ... based *exclusively* upon the Administrator's determination of the risk to health at a particular emission level." *Id.* at 1164 (emphasis added). Only after EPA determined, based on that statutory criterion, that the Act's standard of public health "safety" was assured could cost and technological feasibility play any role in EPA's choice among a range of *margins* of safety. *Id.* at 1165.[3]

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[3] *But cf. American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1040-41(construing other Clean Air Act provisions, and holding that EPA may

The other cases cited by EPA (and the majority below) also support, rather than contradict, Petitioners' position here. *See* EPA Br. 16 n.13; Pet. App. 23a. For example, in *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1158 (1999), the FAA, in determining whether overflight regulations satisfied the statutory criterion of "substantial restoration of natural quiet," relied solely on a measure of quiet to define "substantial restoration." *Id.* at 461-62. Only after it had established the meaning of "substantial restoration" consistent with the statute's decisional criterion (based on a measure of "quiet") was the agency allowed to consider cost in adopting a specific program to satisfy the statute. *Id.* at 475.[4] Here, in contrast, EPA ignored air quality in determining whether the governing statutory criterion of significant contribution to nonattainment air quality was met.

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not consider cost in establishing national ambient air quality standards), *modified on reh'g on other grounds*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted*, 120 S. Ct. 2003 and 2193 (2000) (Nos. 99-1257, 99-1426, argued Nov. 7, 2000). In the present case, the court below neither cited its then-recent decision in that case nor tried to explain how it could be reconciled with *NRDC v. EPA*.

[4] The majority below, but not EPA here, also relied on this Court's plurality decision in *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980). Pet. App. 21a-22a. However, that decision made clear that the Secretary of Labor, in assessing "significant" risk of harm, could not substitute cost considerations for the statute's decisional criterion, risk of harm to health. *See Industrial Union Dep't*, 448 U.S. at 639-46. A plurality of this Court held that, because the benzene standard at issue there was based on the lowest economically and technologically feasible level, rather than on consideration of the statute's decisional criterion, promulgation of the standard was unlawful. *See id.* at 659; *see also* Pet. App. 60a n.1 (Sentelle, J., dissenting) (discussing *Industrial Union Dep't*).

Consistent with this case law, Petitioners do not argue that EPA is prohibited from considering cost in fashioning a *remedy* to address a violation of § 110(a)(2)(D)(i)'s prohibition on significant contribution. *See* Pet. 13, 18 (discussing Clean Air Act § 110(k)(5), 42 U.S.C. § 7410(k)(5) (authorizing SIP calls to "mitigate adequately" interstate transport that has been found to "contribute significantly")). However, requiring a state to fashion *any* remedy – whether or not based on cost – is lawful *only after* a determination has been made, based on the statute's decisional criterion, that that state creates a significant air quality contribution to nonattainment air quality in another state. Cost-effectiveness of controls cannot, consistent with Congress' choice of language in § 110(a)(2)(D)(i), be substituted for air quality in making that significant contribution determination.

The language and structure of § 110(a)(2)(D)(i) leave no doubt that the scope and nature of air quality effects must govern any determination of whether a contribution to nonattainment air quality is "significant." *See* Pet. App. 57a, 59a-60a (Sentelle, J., dissenting).[5] Because the majority below departed from Supreme Court precedent establishing that an agency's decision must be based on the decisional criterion provided by Congress, this Court should grant the petition for a writ of certiorari.

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[5] For this reason, there can be no basis for reaching step two of *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), and deferring to EPA's interpretation. That Congress did not expressly define "contribute significantly to nonattainment" is not determinative of whether *Chevron* step two can be reached; it is clear from the language of the Clean Air Act that the significance of an air quality contribution to a nonattainment air quality area must be judged based on air quality considerations. No other reading is possible given the statutory language.

II. BECAUSE THE LOWER COURT'S REASONING FOR REJECTING APPLICATION OF THE NON-DELEGATION DOCTRINE WOULD UNDERMINE THAT DOCTRINE, THIS COURT SHOULD HEAR THIS CASE.

The court below agreed that EPA's $2000-per-ton cost-effectiveness cutoff was not based on any intelligible principle found in the Clean Air Act, *i.e.*, EPA's "selection of the cut-off point was essentially unbounded." Pet. App. 27a; *id.* (EPA "neither rests that [cost-effectiveness] benchmark on anything in the language or function of § 110(a)(2)(D)(i)(I), nor otherwise explains why the resulting cut-off point represents the right degree of 'cost-effectiveness' (i.e., why 'highly cost-effective' should be at that 'height').").

The court nonetheless rejected the argument that EPA's choice of $2000 per ton violated the Constitution's non-delegation doctrine, on the grounds that EPA's action currently affects only "[n]early half of the nation" and not "all American enterprise." *Id.* 28a. Contrary to established law, the court invoked a putative rule that, where agency action affects less than the entire nation, delegation-limiting intelligible principles may permissibly be less "precise" (*id.* 27a) as the basis for judicial affirmation of Executive Branch action that is wholly unconstrained – "unbounded," in the court's words – by *any* intelligible principle, precise or not.

In its response, EPA does not even try to argue that the court's "nationwide effect" prerequisite to application of the Constitution's protection against excessive delegation of legislative authority is correct or defensible. *See* EPA Br. 20. Rather, EPA asserts that its action was constitutional under this Court's precedents addressing the non-delegation doctrine. *Id.* ("The Court need not rely on ... [the court's test]

because Section 110(a)(2)(D) is constitutional under any reasonable view of the nondelegation doctrine.").

Petitioners ask this Court to review the court of appeals' decision, not the reasoning presented in EPA's response. EPA's reasoning contradicts the decision below; unlike the D.C. Circuit, EPA claims that there *was* an intelligible principle that guided its selection of the $2000-per-ton cutoff. Review of the lower court's decision should not be denied on the basis of an argument that that court rejected.

EPA also argues that this Court should not accept Petitioners' invitation to review the issue of the consistency of EPA's $2000-per-ton cutoff with the Administrative Procedure Act's ("APA") prohibition on "arbitrary and capricious" agency action, 5 U.S.C. § 706(2)(A). EPA Br. 21. Yet, if, as the court below held, EPA's selection of the cutoff "was essentially unbounded," Pet. App. 27a, *and* if, as both the court's opinion and EPA assert, EPA's action did not violate the non-delegation doctrine, then EPA's action must have been arbitrary and capricious under the APA. Thus, even if EPA's action did not violate the non-delegation doctrine, this Court should grant certiorari to review why EPA's action was not found deficient under the APA. To let the decision below stand would serve as precedent for agencies to exercise unfettered discretion in violation of the APA so long as they can avoid a finding of violation of the non-delegation doctrine – a result that would vitiate the APA's safeguard against arbitrary and capricious Executive Branch action.

CONCLUSION

Petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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